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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. ~~1307~~ 215

NORMAN H. WEAVER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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THE SUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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NORMAN H. WEAVER,

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vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals, for the Seventh Circuit, entered in the above entitled case on May 13, 1966.

CITATION TO THE OPINION BELOW.

The Opinion of the United States Court of Appeals for the Seventh Circuit has not yet been reported and is printed in Appendix B hereof, *infra*, pp. 20-24.

JURISDICTION.

The judgment of the United States Court of Appeals, for the Seventh Circuit, was entered on May 13, 1966. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

QUESTIONS PRESENTED.

1. Is not the decision of the Court of Appeals in the instant case that the intent to defraud necessary to sustain convictions under 18 U. S. C., Secs. 657 and 1006 does not require a finding of actual loss or injury, or intent to cause loss or injury, or exposure to loss or injury, an erroneous statement of the law and in direct conflict with the rule as laid down in similar cases by the courts of appeal in other circuits?

2. Is a mere showing of acts of maladministration not subjecting the particular institution to actual loss or injury, or even to risk of loss or injury, sufficient to constitute proof beyond a reasonable doubt of the intent to defraud necessary to sustain convictions under 18 U. S. C., Secs. 657 and 1006?

3. Where the evidence clearly shows that there is no intent to defraud, can the conviction of Petitioner be sustained under 18 U. S. C., Secs. 657 and 1006?

STATUTES INVOLVED.

The statutory provisions involved are Sections 657 and 1006, of Title 18, United States Code. They are printed in Appendix A, *infra*, pp. 17-19.

INDICTMENTS INVOLVED.

Count III.

The January, 1964 Grand Jury further charges:

That on or about December 19, 1962, in the Northern District of Illinois, Eastern Division, Lawrence Stickell, Norman H. Weaver, and Lester Brock, defendants herein, being members of the Board of Directors of Midwest Capital Corporation, a small business investment company, duly licensed by the Small Business Administration, with intent to defraud the said Midwest Capital Corporation, did unlawfully and wilfully misapply and cause to be misapplied funds, monies and credits belonging to and entrusted to the care of said Midwest Capital Corporation in the amount of $20,000.00, by fraudulently causing to be disbursed proceeds of Midwest Capital Corporation Check No. 115, in the amount of $20,000.00, dated December 19, 1962, payable to La Salle National Bank, and purportedly representing proceeds of a loan to Grand Improvement Company, whereas in truth and in fact defendants Lawrence Stickell, Lester Brock and Norman H. Weaver well knew that said disbursement did not represent proceeds of a loan to Grand Improvement Company but rather in truth and in fact was used for the fraudulent purpose of supplying defendant Norman H. Weaver with funds he used to purchase stock of the First State Bank of Westmont, Westmont, Illinois; in violation of Section 657, Title 18, United States Code.

Count IV.

The January, 1964 Grand Jury further charges:

That on or about December 19, 1962, in the Northern District of Illinois, Eastern Division, Lawrence Stickell, Norman H. Weaver and Lester Brock, defendants herein, being Directors of Midwest Capital Corporation, a small

business investment company, duly licensed by the Small Business Administration, did, with intent to defraud said Midwest Capital Corporation, unlawfully and wilfully participate, share in and indirectly receive monies and benefits, to-wit: the sum of $20,000.00, by means of and through the disbursement by Midwest Capital Corporation of its Check No. 115, in the amount of $20,000.00, payable to the La Salle National Bank, dated December 19, 1962, and purportedly representing proceeds of a loan to Grand Improvement Company; in violation of Section 1006, Title 18, United States Code.

STATEMENT OF THE CASE.

The United States Court of Appeals for the Seventh Circuit sustained the conviction of Petitioner Norman H. Weaver (hereinafter referred to as Weaver) under Counts III and IV of the indictment herein (Appendix B, pp. 23-24). Count III of the indictment charges that Lawrence Stickell (hereinafter referred to as Stickell), Lester Brock (hereinafter referred to as Brock) and Weaver, as directors of Midwest Capital Corporation (hereinafter referred to as Midwest), a small business investment corporation, wilfully caused to be misapplied $20,000.00 belonging to Midwest (App. 18). Count IV of the indictment charges that Stickell, Brock and Weaver, as directors of Midwest, with intent to defraud, participated in or received the aforesaid $20,000.00 belonging to Midwest (App. 19).

At all times relevant to this case Weaver was a resident of Galesburg, Illinois, where he and his brother operated an automobile dealership (Weaver, App. 333). There Weaver knew Stickell, who was a prominent attorney in Galesburg, and who had been Weaver's attorney since approximately 1943 (Weaver, App. 333-334).

On July 26, 1962, Stickell on his own behalf entered into a Sales Contract to purchase all of the common stock of

Midwest, which was an Illinois corporation as well as being a licensee of the Small Business Administration, from its then sole shareholder H. W. Beeler (hereinafter referred to as Beeler) for the sum of $250,000.00 (Gov't Ex. #1, App. 400-402).

In addition, in the early part of November, 1962, Stickell and Weaver, as individuals, began finalizing negotiations for the purchase of the controlling stock interest in the First State Bank of Westmont (hereinafter referred to as Westmont), which negotiations culminated in an agreement, dated December 19, 1962, between Weaver and the then owners of 335 shares of the capital stock of Westmont, for the purchase by Stickell and Weaver of such 335 shares for $469,000.00 (Gov't. Ex. #5, App. 417-418). However, the sales agreement for the purchase of the 335 shares was signed only by Weaver (Gov't. Ex. #5, App. 417-418), on the part of the purchasers, because Stickell, who had prepared the original agreement, told Weaver that he, Stickell, was the president of one or more securities companies and that as such an officer he was not supposed to invest in other businesses (Weaver, App. 335).

However, the uncontradicted evidence shows that Stickell as well as Weaver negotiated for the purchase of the 335 shares (Stickell, App. 64-66) (Weaver, App. 334-338); that it was the understanding between Weaver and Stickell that they were purchasing such stock together; that at a minimum Stickell agreed to put up at least the first $100,000.00 and more probably one-half of the $469,000.00 purchase price (Stickell, App. 147) (Weaver, App. 342-344). As to whether the purchase of the bank stock was to be made by Stickell and Weaver together, Stickell's own testimony was, "I think I told Mr. Weaver that I was willing to put up half of the $469,000.00" (Stickell, App. 147), and as proof of his ability to do so, Stickell showed Weaver financial statements indicating a net worth in excess of $1,000,000.00 (Weaver, App. 336-342).

Of the $469,000.00 purchase price for the bank stock, $20,000.00 was required to be paid on December 19, 1962. On that date, Stickell asked Weaver, "Where are we going to get $20,000.00 today?" (Brock, App. 236.) Weaver said that he did not have $20,000.00 in cash in Chicago, but that he could go to Galesburg and get it that evening or the next day. Stickell then suggested that Midwest loan that amount. Weaver then drew his valid personal check on the First National Bank of Galesburg, Illinois, for $20,000.00, payable to Midwest, and delivered it to Midwest's president, Brock, as security for the loan (Brock, App. 236-237). (Stickell, App. 70-71).

Brock took Weaver's check, clipped it in Midwest's checkbook; wrote a Midwest check in the sum of $20,000.00, payable to La Salle National Bank of Chicago, Illinois (Brock, App. 237); and at Stickell's instructions, obtained from La Salle National Bank its cashier's check payable to the sellers of the Westmont stock (Brock, App. 237).

Brock then delivered the La Salle cashier's check to Stickell (Brock, App. 238). Later Brock asked Stickell what should be done with Weaver's $20,000.00 check to Midwest, and Stickell said that he would include the $20,000.00 in the loan to Grand Improvement Company, an Illinois corporation (hereinafter referred to as Grand Improvement), the capital stock of which was wholly owned by Weaver (Brock, App. 247) (Weaver, App. 369). Grand Improvement had been incorporated by Stickell as Weaver's attorney to hold title to certain real estate in Galesburg being purchased by Weaver (Stickell, App. 75). Thereafter, Brock returned to Weaver his $20,000.00 check, payable to Midwest (Brock, App. 243).

At the last of January or first of February, 1963 (Stickell, App. 77), the Board of Directors of Midwest, pursuant to waiver of notice, held a meeting, the minutes of which

were dated November 15, 1962 (Gov't. Ex. #2B, App. 408-409), at which it was unanimously voted to loan Grand Improvement the sum of $52,000.00 at 6½ percent interest per annum, payable over a term of five (5) years, secured by a pledge of all its outstanding stock (Gov't. Ex. #2B, App. 408-409).

At the last of January or first of February, 1963, at Weaver's direction, Theodore R. Mellican (hereinafter referred to as Mellican), was elected president of Weaver's solely owned corporation, Grand Improvement, which election was to be effective as of November 15, 1962, and at the time of his election, in his capacity as such president, he executed a loan agreement with, and a promissory note in the amount of $52,000.00 and pledge agreement securing such note to, Midwest, all of which were dated November 15, 1962, and all of which were delivered to Midwest (Gov't. Ex. 7-7A, App. 431-437).

REASONS FOR GRANTING THE WRIT.

Count III of the indictment in the case at bar alleges that on or about December 19, 1962, Stickell, Brock and Weaver, as directors of Midwest, with intent to defraud Midwest, unlawfully and wilfully misapplied $20,000.00 belonging to Midwest by causing such sum on December 19, to be disbursed to La Salle National Bank, purportedly as a loan to Grand Improvement but in actuality as a loan to Weaver.

Count IV of such indictment alleges that on or about December 19, 1962, Stickell, Brock and Weaver, as directors of Midwest, with intent to defraud Midwest, unlawfully and wilfully received such sum of $20,000.00 by means of the check to La Salle National, dated December 19, 1962, purportedly representing a loan to Grand Improvement.

In examining these two counts of the indictment several points are apparent.

First, the key date is December 19, 1962. Second, the acts that are alleged to have occurred are the drawing of the check and the receipt of the proceeds of such check. Third, Weaver is accused of wrongdoing in his capacity as a director. Fourth, the crime alleged is that on December 19, 1962, the proceeds purportedly represented a loan to Grand Improvement when, in fact, Weaver received such sum.

Now on December 19, 1962, viewed in the light most favorable to the government, the only acts that occurred were as follows:

(1) There was a discussion among Stickell, Brock and Weaver as to the source of the $20,000.00 earnest money payment due that day on the purchase of the Westmont stock. When asked by Stickell, Weaver stated that he did not have $20,000.00 in cash in Chicago, but he had it in Galesburg, and Weaver offered to go to Galesburg that evening or the next day and get it (Stickell, App. 70).

(2) (Stickell, App. 70-71).

"Q. Then what did you say, sir, if anything?

A. I suggested that Midwest Capital loan Mr. Weaver the sum of $20,000.00 that date."

(3) Later in the day Weaver agreed to this arrangement (Stickell, App. 71).

(4) In the offices of Midwest, Weaver drew his good personal check in the sum of $20,000.00 as security for the loan payable to Midwest, and delivered it to Brock, who clipped it in Midwest's checkbook (Brock, App. 237).

(5) In the Chicago offices of Midwest, in Weaver's presence, Brock drew Midwest's check which was signed by Brock and Stickell, payable to the La Salle National Bank; was told by Stickell to purchase a cashier's check, payable to the sellers of the Westmont stock in the sum of $20,000.00;

went downstairs to the bank which was in the same building, and bought a cashier's check in the sum of $20,000.00, payable to the sellers of the Westmont stock; returned to the offices of Midwest; and delivered the $20,000.00 cashier's check to Stickell who left with Weaver (Brock, App. 237).

(6) Stickell and Weaver delivered the cashier's check to the sellers of the Westmont stock (Stickell, App. 73).

On these facts the indictment is faulty and, in fact does not state a crime, because on December 19, 1962, viewing the evidence in the light most favorable to the government, Weaver, in his capacity as a director, had done nothing. Weaver did not vote as a director to have Midwest loan him $20,000.00. Weaver did not draw the check from Midwest to La Salle National Bank. Weaver as a director did nothing. At most Weaver, as an individual, borrowed $20,000.00 from Midwest on December 19, 1962, on an open account loan and gave as security his perfectly valid and collectible $20,000.00 personal check. This is not an unlawful application. This is not a crime. *Golden* v. *United States*, 318 F. 2d 357, 362, 363 (1st Cir. 1963), *United States* v. *Wiggenhorn*, 312 F. 2d 289, 292 (9th Cir. 1963), *United States* v. *Cawthon*, 125 F. Supp. 419, 422, 423 (1954). The allegation in the indictment that the $20,000.00 was used as a down payment on the purchase of the Westmont stock may indicate a maladministration of the affairs of Midwest, but it does not charge a crime. *United States* v. *Britton*, 108 U. S. 193, 197-199 (1882); *Giragosian* v. *United States*, 349 F. 2d 166, 169 (1st Cir. 1965); *United States* v. *Matsinger*, 191 F. 2d 1014, 1017 (3rd Cir. 1951). However, Petitioner does not have to rely simply on this technical position before this Court, because the facts are clear that there was no intent to defraud on the part of Petitioner, and no fraud in fact was perpetrated on Midwest.

After the negotiations by Weaver and Stickell for the

purchase of 335 shares of the capital stock of Westmont, culminated in an agreement to purchase such stock at a price of $469,000.00, of which $20,000.00 had to be paid on December 19, 1962, on that date, Stickell suggested to Weaver and Brock that Midwest furnish the $20,000.00 payment. Then, at Stickell's suggestion, Weaver drew his perfectly valid personal check to Midwest and delivered that check to Brock as president of Midwest as security for the loan. When Brock, at Stickell's instruction, obtained the $20,000.00 cashier's check payable to the sellers of the Westmont stock, although all of the book entries had not been made, the legal effect of the transaction was that a $20,000.00 open account loan had been made to Weaver, secured by Weaver's good check for $20,000.00. Later, when Brock returned Weaver's check to Weaver, there still was a valid and collectible open account loan to Weaver in the amount of $20,000.00. Weaver, of course, also owned all of the issued and outstanding common stock in Grand Improvement.

Thus, in piercing the corporate veil, Stickell controlled Midwest, running it as if it were a sole proprietorship, and Weaver owned Grand Improvement, which he treated in a similar fashion. Hence the reason that all of the corporate formalities may not have been observed here. Stickell, of course, was a lawyer and had been Weaver's attorney for nearly 20 years (Weaver, App. 333-334). Obviously, as a lawyer, Stickell knew that a directors' meeting should be held, but since he fully controlled Midwest, he followed the rather common commercial practice of making the agreement, and then later going back to reflect the transaction in the corporate minutes. Weaver, being a layman and a client of Stickell, relied on Stickell for legal advice and followed Stickell's lead. Therefore, Weaver adopted a similar pattern in his handling of Grand Improvement.

Weaver simply regarded Grand Improvement as his alter ego, which it was.

Apparently, sometime in late January or early February, 1963, Stickell felt that the situation with respect to the disbursements which had been made from the funds of Midwest should be regularized. Accordingly, Stickell suggested that a loan should be made to Grand Improvement in the sum of $52,000.00. This was perfectly agreeable to Weaver because he understood that he and Stickell were partners or joint venturers in an undertaking to purchase the stock of Westmont. Since Grand Improvement was merely Weaver's alter ego, the form of the transaction was that of a loan to his controlled corporation, Grand Improvement, in the sum of $52,000.00, into which sum was incorporated the $20,000.00 originally loaned to make the first payment for the Westmont stock, plus other monies which had been disbursed from Midwest, but which Weaver felt would eventually be repaid to him by his partner, Stickell. This is the reason why late in January or at the first of February, 1963, a directors' meeting of Midwest was held at which the loan to Grand Improvement was authorized, the minutes being backdated to November 15, 1962 (Stickell, App. 77), and why the Grand Improvement loan agreement, note and pledge agreement were backdated to the same date although signed sometime in late January or early February, 1963, by Mellican as president (Stickell, App. 79). Granted Mellican was not president of Grand Improvement prior to the date of execution of these documents, he nevertheless was president on the date of execution and there is no doubt that the Grand Improvement obligation was fully collectible, and there was no effort even to prove to the contrary.

The net effect was that at all times there was an open account loan to Weaver which was good. There also was a valid $52,000.00 note of Grand Improvement, secured by

a pledge agreement. If the $52,000.00 Grand Improvement note did not serve as an effective substitution for Weaver's obligation, then, at all times, there still was the valid and collectible obligation of Weaver on the open account loan. Midwest was never exposed to any loss and never suffered any loss. Financial responsibility and repayment certainly have some bearing on the issue of intent to defraud. *Seals* v. *United States*, 221 F. 2d 243, 249 (8th Cir. 1955). A similar situation is created when an official of a bank cashes a check which creates an overdraft, and yet the mere fact that the overdraft occurred standing by itself does not show an intent to defraud. *United States* v. *Wiggenhorn*, 312 F. 2d 289, 292 (9th Cir. 1963). Granted certain intentional acts were done on Weaver's part, e. g. backdating certain corporate minutes, but there was completely absent on his part any intent to commit a crime. *Morissette* v. *United States*, 342 U. S. 246, 275, 276 (1951).

From the foregoing it is plain that Midwest was never exposed to any risk of loss or injury, and never in fact suffered any loss or injury. This last, in effect, is conceded by the United States Court of Appeals for the Seventh Circuit when it is stated at page 24 of Appendix B that it was not necessary for the government to establish that Weaver's personal check was worthless or that the Grand Improvement loan was uncollectible. This is true, but the government certainly was required to show that there was some exposure, some risk of loss or injury to Midwest, in order to prove beyond a reasonable doubt an intent to defraud.

Here Weaver is being convicted because the correct form was not followed. He violated nothing of substance. His conviction appears to have been sustained on the theory that an irregularity occurred when the Grand Improvement note, pledge and loan agreement were backdated to November 15, 1962, thereby making the loan to Grand Improve-

ment fraudulent. However, this is not true and there was no such fraud. Weaver owned Grand Improvement lock, stock and barrel. Rightly or wrongly, he felt that Grand Improvement was his to do with as he saw fit. He knew, and Stickell knew, what the transaction was. He and Stickell were buying the stock of Westmont together. They were partners or joint venturers in this. The $52,000.00 was to be advanced by Weaver to Stickell for Stickell's share of the joint venture. It is no crime that the $52,000.00 was to come from Midwest in the form of a loan to Grand Improvement because Grand Improvement could disburse or direct to be disbursed the loan proceeds in any manner. As far as Weaver knew, there was nothing wrong with this because the obligation of Grand Improvement was good and if the obligation of Grand Improvement was not good, then Weaver himself was liable on the open account loan.

Here there is no intent to cause loss or injury to Midwest. There is no intent to defraud Midwest. There is, in fact, no loss to Midwest. There is no evidence from which a reasonable inference can be drawn that there was intent to defraud Midwest. There merely is a failure to observe certain formal corporate procedures, the maladministration of *United States* v. *Britton*, 108 U. S. 193, 198, 199 (1882); *United States* v. *Britton*, 108 U. S. 199, 206 (1882). Thus, had the records of Midwest, pursuant to a directors' meeting, reflected a loan to Grand Improvement on December 19, 1962, and had there been a directors' meeting of Grand Improvement electing Mellican its president, and had Grand Improvement given Midwest a written direction to disburse the sum of $52,000.00 in the manner in which such sum actually was disbursed, there would be no case. Weaver's conviction seems to be based solely on the fact that the minutes of Weaver's solely owned corporation were backdated and on the fact that Weaver orally rather than in writing directed how the loan pro-

ceeds were to be disbursed. It is respectfully submitted that this failure to comply with form is not sufficient to sustain the conviction of Weaver. Weaver's open account obligation was valid. The Grand Improvement note was valid.

Therefore, it is respectfully suggested that in the instant case, as in *Heikkinen* v. *United States,* 355 U. S. 273 (1957), the Court of Appeals for the Seventh Circuit is erroneously defining the element of intent; thereby, laying down a rule of law not in harmony with that laid down by courts of appeal in other circuits. Here, the misdefined intent is the intent to defraud necessary to sustain convictions under 18 U. S. C. Secs. 657 and 1006. The error lies in defining intent to defraud to be synonymous with maladministration and by not requiring proof beyond a reasonable doubt of intent to cause loss or harm to Midwest.

Thus, as stated by this Court in *United States* v. *Britton,* 108 U. S. 199, 206 (1882) in referring to a situation where a national bank had declared a dividend when there were no net profits to pay such dividend:

> "If procuring the declaring of such a dividend by the association is not a wilful misapplication of its funds by these defendants, then the indictment charges no offence. The declaring of a dividend by the association when there were no net profits to pay it is, in our judgment, not a criminal misapplication of its funds. It is an act done by an officer of the association in his official and not in his individual capacity. It is, therefore, an act of maladministration and nothing more, which, while it may subject the association to a forefeiture of its charter, and the directors to a personal liability for damages suffered in consequence thereof by the association or its shareholders, does not render them liable to a criminal prosecution."

As further stated by this Court in *United States* v. *Britton,* 107 U.S. 655,667 (1882) in giving an example of an

action which was one only of maladministration rather than criminal misapplication.

> "For instance, Sec. 5200 of the Revised Statutes declares 'that the total liabilities to any association of any person . . . for money borrowed, . . . shall at no time exceed one-tenth part of the capital stock of the association actually paid in.' Sec. 5201 provides that no association shall make any loan or discount on the security of the shares of its own capital stock, unless such security shall be necessary to prevent loss on a previously contracted debt. If the counts under consideration are sustained, then every president, director, cashier, teller, clerk, or agent of a banking association who has any part in lending the money of the association contrary to the provisions of these sections, is guilty of a criminal misapplication of its funds."

This Court then went on to hold that certain counts of an indictment which set forth actions similar to the above illustration were bad as simply not charging crimes.

Furthermore, the intent to defraud necessary under 18 U. S. C., Sec. 657 and 1006 must be shown by substantial evidence which excludes every other hypothesis but that of guilt and where all the substantial evidence is as consistent with innocence as with guilt, it is the duty of the court to reverse. *Seals* v. *United States,* 221 F. 2d 243, 249, 250 (8th Cir. 1955).

As here, where the evidence shows no intent to defraud, no intent to cause injury, no intent to cause loss, no risk of loss or injury, and where the evidence does not exclude every other hypothesis but that of guilt, it is respectfully submitted that this Court should reverse. *Heikkinen* v. *United States,* 355 U. S. 273 (1958).

Wherefore, Petitioner prays that this Honorable Court may grant the Petition for Writ of Certiorari and may review the determination of the United States Court of Ap-

peals for the Seventh Circuit, and upon review may reverse the decision of that Court.

Respectfully submitted,

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APPENDIX A.

§ 657. Lending, credit and insurance institutions.

Whoever, being an officer, agent or employee of or connected in any capacity with the Reconstruction Finance Corporation, Federal Deposit Insurance Corporation, Home Owners' Loan Corporation, Farm Credit Administration, Federal Housing Administration, Federal Crop Insurance Corporation, Farmers' Home Corporation, the Secretary of Agriculture acting through the Farmers' Home Administration, or any land bank, intermediate credit bank, bank for cooperatives or any lending, mortgage, insurance, credit or savings and loan corporation or association authorized or acting under the laws of the United States or any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation, or any small business investment company, and whoever, being a receiver of any such institution, or agent or employee of the receiver, embezzles, abstracts, purloins or willfully misapplies any moneys, funds, credits, securities or other things of value belonging to such institution, or pledged or otherwise intrusted to its care, shall be fined not more than $5,000 or imprisoned not more than five years, or both; but if the amount or value embezzled, abstracted, purloined or misapplied does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both. June 25, 1948, c. 645, 62 Stat. 729; May 24, 1949, c. 139, § 11, 63 Stat. 90; July 28, 1956, c. 773, § 1, 70 Stat. 714; Aug. 21, 1958, Pub. L. 85-699, Title VII, § 703, 72 Stat. 698; Oct. 4, 1961, Pub. L. 87-353, § 3(q), 75 Stat. 774.

§ 1006. Federal credit institution entries, reports and transactions.

Whoever, being an officer, agent or employee of or connected in any capacity with the Reconstruction Finance Corporation, Federal Deposit Insurance Corporation, Home Owners' Loan Corporation, Farm Credit Administration, Federal Housing Administration, Federal Crop Insurance Corporation, Farmers' Home Corporation, the Secretary of Agriculture acting through the Farmer's Home Administration, or any land bank, intermediate credit bank, bank for cooperatives or any lending, mortgage, insurance, credit or savings and loan corporation or association authorized or acting under the laws of the United States or any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation, or any small business investment company, with intent to defraud any such institution or any other company, body politic or corporate, or any individual, or to deceive any officer, auditor, examiner or agent of any such institution or of department or agency of the United States, makes any false entry in any book, report or statement of or to any such institution, or without being duly authorized, draws any order or bill of exchange, makes any acceptance, or issues, puts forth or assigns any note, debenture, bond or other obligation, or draft, bill of exchange, mortgage, judgment, or decree, or, "with intent to defraud" the United States or any agency thereof, or any corporation, institution, or association referred to in this section, participates or shares in or receives directly or indirectly any money, profit, property, or benefits through any transaction, loan, commission, contract, or any other act of any such corporation, institution, or association, shall be fined not more than $10,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat.

750; May 24, 1949, c. 139, § 20, 63 Stat. 92; July 28, 1956, c. 773, § 2, 70 Stat. 714; Aug. 21, 1958, Pub. L. 85-699, Title VII, § 704, 72 Stat. 698; Oct. 4, 1961, Pub. L. 87-353, § 3(s), 75 Stat. 774.

APPENDIX B.

IN THE UNITED STATES COURT OF APPEALS.

For the Seventh Circuit.

SEPTEMBER TERM, 1965—APRIL SESSION, 1966

No. 15235
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
NORMAN H. WEAVER,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

MAY 13, 1966

Before SCHNACKENBERG, and CASTLE, *Circuit Judges,* and MAJOR, *Senior Circuit Judge.*

CASTLE, *Circuit Judge.* Norman H. Weaver, defendant-appellant, prosecutes this appeal from a judgment of conviction and sentence, entered following a trial before the court without a jury, on each of six counts of an indictment[1] charging violations of 18 U. S. C. A. § 656, § 657, § 1005, § 1006, § 2 and § 371. The defendant was sentenced to imprisonment for a period of one year on each of the six counts, the sentences to run concurrently with each other.

1. The indictment is in twenty-one counts, and in addition to Norman H. Weaver names Lawrence Stickell and Lester Brock as defendants. Weaver was convicted on all six of the counts in which he is named (Counts III, IV, XIV, XV, XVI and XXI).

Defendant's appeal challenges the sufficiency of the evidence to sustain the convictions.

On appeal, in resolving the issue of the sufficiency of the evidence to sustain a conviction, we view the evidence, together with the reasonable inferences which may be drawn therefrom, in the light most favorable to the government. *Glasser* v. *United States,* 315 U. S. 60, 80; *United States* v. *Abraham,* 7 Cir., 347 F. 2d 395, 396.

Count III of the indictment charges the defendant, together with Lawrence Stickell and Lester Brock, with a misapplication of $20,000 of the funds of Midwest Capital Corporation, a licensee of the Small Business Administration, while a member of the board of directors of that corporation, and with misrepresenting that the amount was a loan to Grand Improvement Company when in fact it had been diverted to the personal use of the defendant for the purchase of bank stock. Count IV refers to the same $20,000 transaction and charges the three defendants with unlawful participation in benefits therefrom.

Counts XIV, XV and XVI charge similar offenses in connection with the funds and records of the First State Bank of Westmont, Illinois, of which Weaver was a director and chairman of the board, and the deposits of which were insured by the Federal Deposit Insurance Corporation. The transactions referred to in these counts involve alleged misapplication or diversion of funds of the bank to the purchase by Brock of the stock of Crest Finance Company,[2] false entries in the bank records reflecting deposits to the credit of the Crest Finance Company, and disbursements from such account to Weaver. Count XXI charges a conspiracy between the three defendants to commit the substantive offenses charged.

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2. The transactions involving Crest Finance Company resulted in State court civil litigation culminating with the opinion reported as *Crest Finance Co., Inc.* v. *First State Bank of Westmont,* 66 Ill. App. 2d 364.

Counts III and IV charge a violation of 18 U. S. C. A. §657 and § 1006, respectively. The gravamen of the crime defined in § 1006 is the fraudulent receipt of benefits by an officer in a loan made by his institution; the gravamen of § 657 is the fraudulent conduct of an officer in misapplying the funds of his institution. *United States* v. *Hickey et al.*, 7 Cir., ... F. 2d ....., ... (Nos. 15015-15018, Opinion filed April 4, 1966).

The record discloses that in June of 1962, defendant Norman H. Weaver, a resident of Galesburg, Illinois, where he and his brother operated an incorporated automobile sales agency known as Weaver's Motors, expressed an interest in joining with Lawrence Stickell, a Galesburg attorney, in the purchase of Midwest Capital Corporation,[3] a licensee of the Small Business Administration. In July of 1962, Stickell entered into an agreement for the purchase of Midwest's stock from its sole stockholder. A $50,000 down payment was made on the $250,000 purchase price and 51% of the stock was delivered to Stickell. On October 2, 1962, Stickell voted the stock to elect himself, Weaver and Lester Brock directors of Midwest. At the same meeting of shareholders Brock was elected president of the corporation and Weaver its treasurer.

The evidence relating to the violations charged in Counts III and IV of the indictment, when viewed in the light most favorable to the government, warranted the trial court in finding the existence of facts which may be summarized as follows. In the early part of November 1962, Weaver and Stickell began negotiations for the purchase of the First State Bank of Westmont which culminated in an agreement between Weaver and the owners of 335 shares of the stock of the bank for purchase of such stock by Weaver for $469,000. Of this amount $20,000 was to be paid on December 19, 1962. In order to obtain $20,000 to make

3. Sometimes referred to herein as "Midwest".

this payment Weaver, on December 19, 1962, arranged with Stickell and Brock for the issuance of a Midwest Capital Corporation check in that amount payable to LaSalle National Bank. Weaver delivered to Brock his personal check on a Galesburg, Illinois, bank made out to Midwest for $20,000 as "security" stating that "it would be only a one or two-day transaction". The Midwest check to the LaSalle National Bank was used to purchase a cashier's check from the latter payable to the sellers of the bank stock, which was delivered to them pursuant to the purchase agreement. About two weeks later Weaver told Brock not to deposit the personal check Weaver had given him. That check was later returned to Weaver. Weaver advised Brock that a loan would be set up on the books of Midwest to Grand Improvement Company to cover the $20,000 withdrawal from Midwest's funds. Grand Improvement Company was a corporation controlled by Weaver. Such a cover-up loan was set up on the books of Midwest. The loan application and agreement were dated November 15, 1962. However these papers were not made out or executed until sometime late in January or early in February, 1963; and when executed they were signed by a nominee of Weaver's, an employee of Weaver's Motors, who signed as president of Grand Improvement Company at Weaver's request, although he had never been an officer of Grand Improvement Company prior to that date. Grand Improvement Company received no moneys from Midwest.

In our opinion the above facts, and the reasonable inferences deducible therefrom, are amply sufficient to sustain the defendant's convictions on the offenses charged—fraudulent misapplication of Midwest's funds by Weaver as charged in Count III, and his participation in benefits of the fraudulent transaction as charged in Count IV. The defendant's contention that the evidence fails to establish fraudulent intent upon his part is unpersuasive. It is

based for the most part on the faulty premise that it was necessary for the government to establish that the personal check he delivered to Brock but later retrieved was worthless and that the loan to Grand Improvement Company was uncollectible. But actual loss to the officer's institution is not an element essential to the establishment of the fraudulent intent requisite to a conviction of the type of offense here involved. Cf. *Golden* v. *United States,* 1 Cir., 318 F. 2d 357, 361; *Robinson* v. *United States,* 6 Cir., 30 F. 2d 25, 27; *Hargreaves* v. *United States,* 9 Cir., 75 F. 2d 68, 72.

Where conviction on one count of an indictment is sustained it becomes unnecessary to consider the conviction on any other count on which the sentence imposed is not greater than and is concurrent with that imposed on the count sustained. *United States* v. *Gibas,* 7 Cir., 300 F. 2d 836, 841; *United States* v. *Cioffi,* 2 Cir., 253 F. 2d 494, 496. Inasmuch as we sustain the defendant's conviction on each of Counts III and IV, and his sentence on each of the remaining four counts is also for a one year period and is concurrent with the sentences imposed on Counts III and IV, we perceive no useful purpose in extending this opinion to discuss the defendant's contention that the evidence relating to the remaining four counts is insufficient to sustain the convictions thereon.

The judgment order appealed from is affirmed.

AFFIRMED.

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 215

NORMAN H. WEAVER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. B) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on May 13, 1966. The petition for a writ of certiorari was filed on June 9, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the evidence was sufficient to establish fraudulent intent.

STATUTES INVOLVED

18 U.S.C. 657 provides in pertinent part:

> Whoever, being an officer, agent or employee of or connected in any capacity with * * * any small business investment company * * * embezzles, abstracts, purloins or willfully misapplies any moneys, funds, credits, securities or other things of value belonging to such institution, or pledged or otherwise intrusted to its care, shall be fined not more than $5,000 or imprisoned not more than five years, or both * * *.

18 U.S.C. 1006 provides in pertinent part:

> Whoever, being an officer, agent or employee of or connected in any capacity with * * * any small business investment company * * * with intent to defraud the United States or any agency thereof, or any corporation, institution, or association referred to in this section, participates or shares in or receives directly or indirectly any money, profit, property, or benefits through any transaction, loan, commission, contract, or any other act of any such corporation, institution, or association, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

STATEMENT

After a non-jury trial (see R. 8)[1] in the United States District Court for the Northern District of

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[1] Record references are to the "Defendant's Appendix" below.

Illinois, petitioner was convicted on six counts (III, IV, XIV-XVI, and XXI) of a 21-count indictment (R. 12).[2] Counts III and IV charged violations of 18 U.S.C. 657 and 1006 based on the misapplication of $20,000 of the funds of Midwest Capital Corporation (Pet. 3-4). Counts XIV-XVI charged misapplication of more than $900,000 of the funds of the First State Bank of Westmont and false entries in connection with this misapplication, and Count XXI charged conspiracy to commit the substantive offenses (R. 26-29, 34-38). Petitioner was sentenced to imprisonment for one year on each of the six counts, the terms to run concurrently (R. 12). In affirming, the court of appeals limited its consideration to Counts III and IV.

The evidence relating to these counts showed that Lawrence Stickell purchased a controlling interest in the Midwest Capital Corporation, a Small Business Investment company chartered by the Small Business Administration, in July 1962 (R. 57-58), and elected himself, Lester Brock and petitioner directors (R. 59-62). In December 1962 petitioner, acting through Stickell, arranged to purchase a controlling interest in the First State Bank of Westmont. The agreement provided that $20,000 of the purchase price was to be paid on December 19, 1962. (R. 65-69.) On that day, in the Chicago office of Midwest, petitioner, Stickell

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[2] Petitioner was not named in the remaining 15 counts of the indictment. Petitioner's co-defendants, Laurence Stickell and Lester Brock, who were named in those counts, entered pleas of guilty prior to trial and testified for the government (R. 7).

and Brock discussed the availability of this amount. Petitioner indicated that he could not obtain the funds that day but could do so subsequently, and Stickell suggested that Midwest lend him the amount. Petitioner agreed that this would be a satisfactory arrangement if done for a period of only a few days. (R. 70-71, 236-237.) Petitioner then gave Brock his personal check, made out to Midwest, for $20,000. A check in this amount was issued by Midwest and used to procure a cashier's check payable to the sellers of the Westmont bank. (R. 237.) Petitioner and Stickell delivered the cashier's check that evening to the payees (R. 73). It was this loan by Midwest to petitioner to enable him to purchase the Westmont bank's stock that formed the basis of Counts III and IV.

Either that night or the next morning petitioner suggested to Stickell that a loan in the amount of $20,000 to $35,000 be made by Midwest to the Grand Improvement Company, a corporation controlled by petitioner (R. 74-76). About two weeks later, when Brock asked petitioner about his personal check, petitioner replied that he had discussed the possibility of a loan with Stickell. Petitioner instructed Brock not to deposit the check. (R. 76, 243.) The check was subsequently returned to petitioner (R. 243).

In the middle of January 1963, Brock, while preparing a report on Midwest for the Small Business Administration, called Stickell's attention to withdrawals from Midwest's funds which could not be accounted for or which appeared to be unreasonable. Stickell suggested that the items could be taken care

of by entries reflecting a loan to the Grand Improvment Company (a Company controlled by petitioner) in the amount of $12,000, and that he would ask petitioner's permission to do so. He also indicated that the $20,000 check written for the purchase of the Westmont stock would be shown as a loan to Grand Improvement. Subsequently, petitioner acknowledged to Brock that he had discussed with Stickell the matter of the "covering" loan. (R. 241-243.)

On January 29, 1963, another $20,000 check was drawn on Midwest funds, converted into cashier's checks, and applied to the account of State Street Securities, a corporation organized by petitioner and Stickell, and to Stickell's personal account (R. 84-89; 243-245). Stickell indicated that this expenditure would be described as another $20,000 loan to Grand Improvement and would be covered in the same note with the prior disbursements of $20,000 and $12,000 (R. 244).

In late January or early February a loan to Grand Improvement, in the amount of $52,000, was set up on the books of Midwest by Brock (R. 247-248). The loan application and agreement were dated November 15, 1962, although they had not in fact been prepared or executed prior to late January 1963. They described contemplated disbursements of $12,000 on November 15, 1962, and $20,000 on December 19, 1962, and January 29, 1963. Petitioner instructed Brock to bring the papers to his Galesburg automobile sales office where petitioner had an employee, Ted Mellican, sign them as president of Grand Improve-

ment. (R. 77-80; 245-247; 431-450.) Mellican had never been an officer of Grand Improvement, and neither he nor Grand Improvement received any money from Midwest (R. 295-296).

ARGUMENT

It is clear that petitioner committed a crime in receiving a loan from a Small Business Investment company of which he was a director if he acted with fraudulent intent. His argument that the evidence of such intent was insufficient is without merit and presents no issue warranting review by this Court. The total circumstances of the transaction, recounted in the Statement, *supra*, warranted the inference of fraudulent intent drawn by the trial court. As early as December 19 or 20, 1962, petitioner had broached with Stickell the subject of disguising the loan to him as a loan to Grand Improvement. This and subsequent events showed that petitioner from the outset envisaged the concealment of the improper personal loan to himself under the cloak of a fictitious loan agreement with Grand Improvement. On these facts, a finding of fraudulent intent was justified. See *Hargreaves* v. *United States*, 75 F. 2d 68, 72 (C.A. 9); *Cravens* v. *United States*, 62 F. 2d 261, 277 (C.A. 8), certiorari denied, 289 U.S. 733; cf. *Agnew* v. *United States*, 165 U.S. 36. As the court of appeals noted (Pet. App. 24), it was not necessary to show that Midwest suffered actual loss as a result of petitioner's misapplication of its funds. See *Golden* v. *United States*, 318 F. 2d 357 (C.A. 1); *Robinson* v.

United States, 30 F. 2d 25 (C.A. 6); *Hargreaves* v. *United States*, *supra*.[3]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Attorneys.

JULY 1966.

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[3] Since concurrent sentences were imposed, the court of appeals found it unnecessary to consider the other counts on which petitioner was convicted. However, there is little doubt that petitioner was properly convicted on them as well, and hence that the judgment of the district court is valid irrespective of Counts III and IV. The scheme by which petitioner, Brock, and Stickell wrongfully disbursed some $957,000 of the Westmont bank funds, in an attempt to obtain control of the Crest Finance Company, is set out in detail in the opinion of the State appellate court in related civil litigation. See *Crest Finance Company, Inc.* v. *First State Bank of Westmont*, 66 Ill. App. 2d 364, 214 N.E. 2d 526. The evidence developed at petitioner's trial left no doubt of his full participation, as chairman of the board of directors of the Westmont bank, in this scheme. He was consulted repeatedly and gave his approval as to negotiations (see R. 99, 102-104, 107, 111-113, 114). He authorized the cashier of the bank to make its funds available (R. 107, 109) and he sought and received part of the funds to his personal use (R. 120-121, 262-263).

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OCTOBER TERM, 1966.

No. 215

NORMAN H. WEAVER,

Petitioner,

vs

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF FOR PETITIONER NORMAN H. WEAVER.

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THE BUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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REPLY BRIEF FOR PETITIONER NORMAN H. WEAVER.

With regard to the Argument of the United States in its Brief in Opposition, the petitioner respectfully makes these points in reply.

First, the United States misapprehends, in part, the position of the petitioner. Petitioner's basic argument is that the court of appeals has erred herein as a matter of law in holding that the intent to defraud requisite to sustain convictions under 18 U. S. C., Secs. 657 and 1006 is synonomous with mere acts of maladministration. It is true that secondarily the petitioner also urges that there has been no proof

of intent to defraud; however, the primary tenet of the petitioner before this Court is that under the authority of *United States* v. *Britton,* 107 U. S. 655 (1882); *United States* v. *Britton,* 108 U. S. 193 (1882); and *United States* v. *Britton,* 108 U. S. 199 (1882), even viewing the situation in the light most favorable to the United States, the petitioner has not been charged with nor has he committed a crime.

Second, the petitioner never has urged that actual loss must be shown. He does contend that at least some risk of loss to Midwest Capital Corporation must be shown.

Third, footnote 3 on page 7 of the Brief for the United States in Opposition departs from the issues before this Court to state, in part:

> "Since concurrent sentences were imposed, the court of appeals found it unnecessary to consider the other counts on which petitioner was convicted. However, there is little doubt that petitioner was properly convicted on them as well, and hence that the judgment of the district court is valid irrespective of Counts III and IV."

The petitioner assumes that this attempt to validate his conviction on counts not before this Court constitutes an admission that his conviction cannot be sustained under Counts III and IV of the indictment herein, which are the only counts before this Court.

Fourth, the United States does not question the undeniable fact that at all times there was a valid and collectible obligation belonging to Midwest Capital Corporation, either from the petitioner in the amount of $20,000.00, or from Grand Improvement Company, the petitioner's wholly owned corporation, in the sum of $52,000.00, or from both. Thus, rather than a misapplication or conversion, there was only a substitution of assets, and, therefore, there was no

risk of loss or actual loss suffered by Midwest Capital Corporation. Hence, there was no intent to defraud that corporation on the part of the petitioner.

Fifth, it is difficult to determine the specific wrong which the United States alleges that the petitioner has committed. Unquestionably, everything that the United States alleges against petitioner was done with the full knowledge of all those in control of both corporations, because Midwest Capital Corporation was wholly owned by Lawrence Stickell and Grand Improvement Company by the petitioner. It is true that the minutes of one of the directors' meetings of Midwest Capital Corporation were backdated but there is no allegation that this was done by the petitioner. It is true that the Grand Improvement Company loan agreement, note and pledge agreement were backdated, but their validity is not affected by this. They were and are valid and collectible. Thus, what the books and records of Midwest state to be the case is true. There is and was an enforceable note and pledge agreement from the petitioner's alter ego, Grand Improvement Company, to Midwest Capital Corporation. If backdating documents is to be an offense, then every officer of a bank or savings and loan association, who knowingly permits a deed to be backdated to conform to the date of a mortgage which already has been placed of record, has committed a crime.

With regard to the authorities cited in the Brief of the United States In Opposition, the petitioner respectfully makes these comments.

Hargraves v. *United States*, 75 F. 2d 68 (C. A. 9) (1935) involved a loan from a bank to a bankrupt dummy of one of its officers. Those in charge of the bank were deceived by the form of the transaction, and the unsecured note given by the bankrupt person to whom the money was ostensibly loaned was worthless at the outset. There was

not, as there was in the instant case, an exchange of one valid asset, cash, for another valid asset, a collectible obligation, nor did the other officers and directors have full knowledge of the transaction as they did here.

In *Cravens* v. *United States*, 62 F. 2d 261 (C. A. 8) (1933), as concerns the misapplication counts of the indictment, money was diverted from the institution in two ways, first, by charges to a fictitious Special Bond Investment Account, and, second, by additional charges to straw loan investment accounts pertaining to properties on which the institution already had foreclosed. The joint-stock land bank paid out money and received no consideration in return. As stated previously, in the case at bar money was paid out and collectible obligations were received in return.

In *Agnew* v. *United States*, 165 U. S. 36 (1896) the institution received only worthless bonds in exchange for money paid to one of its officers.

Golden v. *United States*, 318 F. 2d 357 (C. A. 1) (1963), of course, was a case where the conviction was reversed on a point other than the one for which the United States apparently cites the case. However, again the United States misapprehends the petitioner's position. He does not contend that actual loss must be shown. He does urge that risk of loss must be shown.

Robinson v. *United States*, 30 F. 2d 25 (C. A. 6) (1929) concerned fictitious transactions amounting to additional loans to a known insolvent customer of the bank by an officer of the bank without the knowledge of his superiors and is cited by the United States for the proposition that a showing of actual loss is not necessary. This is not the fact situation in the instant case, and again the petitioner herein contends not that actual loss must be shown, but that at least some risk of loss must be shown.

CONCLUSION.

On the facts and on the authorities herein the petition for a writ of certiorari should be granted.

Respectfully submitted,

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